

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of) WC Docket No. 16-106
)
Protecting the Privacy of Customers of)
Broadband and Other Telecommunications)
Services)

**ACT | THE APP ASSOCIATION REPLY TO OPPOSITIONS TO PETITIONS FOR
RECONSIDERATION**

ACT | The App Association (the App Association) respectfully submits these views to the Federal Communications Commission (Commission or FCC) in support of various petitions for reconsideration¹ to the Commission's October 26, 2016-adopted order.² Based on the relief sought by Petitioners, the Commission granted a stay of the rules as of March 1, 2017.³ The App Association files in support of the Petitioners to note our concern with the Commission's broadband privacy rule. The App Association feels the FCC, when promulgating said rules, did not fully appreciate its adverse effects on the small business innovation community. Further, we reiterate our view that, if the Commission is to move forward and promulgate privacy rules, such rules should be as aligned as possible with the approach of the Federal Trade Commission (FTC) in protecting consumer privacy.⁴

¹ The following Petitioners submitted Petitions for Reconsideration in WC Docket No. 16-106 on January 3, 2017: NCTA (NCTA Petition); CTIA (CTIA Petition); United States Telecommunications Association (USTelecom Petition); WISPA (WISPA Petition); Competitive Carriers Association (CCA Petition); ITTA (ITTA Petition); American Cable Association (ACA Petition); Association of National Advertisers, et al. (ANA Petition); Consumer Technology Association (CTA Petition); Level 3 Communications, LLC (Level 3 Petition); and Oracle Corporation (Oracle Petition) (referred to in this document as "Petitioners").

² *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911 (2016) (Broadband Privacy Order).

³ *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Order, WC Docket No. 16-106 (rel Mar. 1, 2017) (Order).

⁴ Letter from Brian Scarpelli, Senior Policy Counsel, ACT | The App Association to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80, GN Docket No. 14-28, MB Docket No. 16-42, WC Docket No. 16-106 (April 22, 2016).

The App Association represents more than 5,000 small- and medium-sized app development companies and technology firms across the world. As the world has quickly embraced mobile technology, the hyper-competitive app ecosystem continues to produce more innovative and more efficient solutions that leverage mobile technologies to drive the global digital economy across modalities and segments, augmenting consumer interactions and experiences throughout their personal and work lives. The app industry has been in existence less than a decade, and it serves as the driving force behind the rise of smartphones and an ever-increasing number of internet-enabled devices. As we detail in our annually-released *State of the App Economy* report,⁵ the app economy is a \$120 billion ecosystem today that is led by U.S. companies, the clear majority of which are startups or small businesses.

Innovators in the app economy represented by the App Association highly value end-user privacy and trust, and they regard these as principles that must be upheld to compete in the marketplace. Legal and regulatory consistency and certainty are integral to the continued success of the app economy that has flourished in the United States under the FTC approach to the use and protection of personal data.

I. The Commission's Broadband Privacy Order is Concerning and Potentially Harmful for App Developers Downstream

The App Association supports the FCC's goals to provide consumers with more transparency, choice, and security when it comes to data privacy—goals our membership fully supports as a whole—but it may not have considered the rules' potentially harmful effects downstream and has not provided adequate justification as to why these more stringent rules are necessary to advance these stated goals. For instance, the Broadband Privacy Order is based on an erroneous assumption that that ISPs have heightened access to broadband customer information over others in the internet ecosystem. This is especially unnerving when one considers the significant implication of the rules' ability to stifle the necessary sharing of data on which app developers rely to increase their apps' utility to millions of American consumers. We believe that the record demonstrates this assumption is, at best, objectively disputed and, at worst, conjecture.⁶ Further, the Commission's Broadband Privacy Order does not justify its decision with *proven* consumer harm, nor does it adequately evaluate the costs and burdens of its regulations (particularly on small businesses) as required under the Regulatory Flexibility Act.⁷ The stakes are just too high given the broader, downstream implications to small business app developers.

⁵ ACT | The App Association, *State of the App Economy 2016* (Jan. 2016), *available at* <http://actonline.org/state-of-the-app-economy-2016/>.

⁶ See Oracle Petition at 3-7.

⁷ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-12).

II. The Commission's Broadband Privacy Rules, in Taking an Approach to Protecting Consumer Harm Inconsistent with that of the Federal Trade Commission, Will Inhibit the Nascent App Economy

The App Association has consistently advocated before the Commission and other policymakers for clarity and consistency in approaches to regulation, particularly in the areas of data security and privacy. As adopted, the Broadband Privacy Order introduces confusion and inconsistencies into the calculation that stakeholders must make when ensuring compliance with laws and regulations concerning the protection of consumer privacy.

First, due to the Commission interjects itself into privacy regulation inconsistent with the FTC's well-established jurisdiction that the internet ecosystem relies upon. As an enforcement agency, the FTC has the authority to stop "unfair or deceptive" acts or practices in commerce. This gives the agency the flexibility to stop privacy practices where they diverge from consumer expectations, without freezing innovation by imposing onerous rules. Second, the rules arbitrarily segregate the internet ecosystem because they only apply to ISPs, introducing inconsistencies in the application of privacy protections to select internet ecosystem stakeholders. For example, the Broadband Privacy Order requires ISPs to obtain affirmative consent before accepting certain types of information—such as web browsing data and app usage—from consumers.

The Commission's standing approach to privacy regulation is almost a complete contrast from that of the FTC's. Although we support actions that maintain the integrity of consumers' data online, the Commission's approach stands to stifle innovation for small businesses in this data-sharing economy. By categorizing them in this way, it demonstrates that the Commission did not properly assess the broadband internet access service (BIAS) market that the nascent and vibrant app economy relies upon to grow their customer base and create jobs. Due to the static nature of the Commission's current rules, this regulatory regime could lead to a hampering of innovation in this flourishing economic space.⁸

⁸ See Comments of the Information Technology Industry Foundation, WC Docket No. 16-106 (filed Mar. 6, 2017).

Through our experience with our membership, we understand that this data-sharing ecosystem is dynamically evolving and that a heavy-handed and overbroad approach would produce far more harm to a business's ability to adapt to market changes, particularly for downstream small business software app developers. For example, the rules' restrictions as they are currently written could potentially foreclose on a BIAS provider's ability to use its data to better assist consumers in a broad spectrum of ways, such as lending its data to advance increasing breakthroughs in artificial intelligence.⁹ This is because the rules underappreciated the "balance between the benefits of additional use of data and the risk of privacy harms,"¹⁰ inequitably placing far more weight on the latter than the former.

More recently, the App Association has been encouraged by Chairman Pai and Acting FTC Chairwoman Ohlhausen's jointly issued statement recognizing and discussing their respective roles and responsibilities in the context of broadband privacy.¹¹ The App Association applauds this coordinated approach to establish clear "rules of the road" for both the Commission and the FTC on these important issues moving forward. Furthermore, we believe that this docket may present an opportunity for both agencies to issue such an important clarification and to restore the FTC's jurisdiction over such matters.

⁹ *See id.* at 4.

¹⁰ *See id.* at 3.

¹¹ Joint Statement of FCC Chairman Pai and Acting FTC Chairman Ohlhausen on Protecting Americans' Online Privacy (Mar. 1, 2017), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0301/DOC-343702A1.pdf.

III. If the Commission is to Promulgate Broadband Privacy Rules, it Should Provide a Reasonable Measures Standard to Mirror the FTC's Data Security Framework

Noting that we support the vacating of the Broadband Privacy Order, the App Association urges that, if the Commission does move forward in adopting broadband privacy rules that the Commission adopt rules similar in approach to that of the FTC. ISPs have long enjoyed and relied on "Privacy Principles," which are a set of principles consistent with the FTC's long-standing framework.¹² These "ISP Privacy Principles" are a commitment on behalf of the ISPs to take reasonable measures from "unauthorized use, disclosure, or access..."¹³ This is preferable because, as the Commission noted in its Order, the so-called Privacy Principles take a myriad of considerations into account, which allow them to meet market demands better and more efficiently than the FCC's current rules permit. The considerations to which the Privacy Principles adhere are "the nature and scope of [ISPs'] activities, the sensitivity of data, the size of the ISP, and technical feasibility."¹⁴ The App Association supports the FTC's approach over the Commission's Broadband Privacy Order because it provides more scalability and dexterity to stakeholders to accommodate the ever-changing market this data-sharing ecosystem experiences.

Then-Commissioner Pai and Commissioner O'Rielly rightly agreed with this position in their respective dissents to the Broadband Privacy Order in noting that the privacy rules would inequitably and overly regulate certain market participants, while not fully demonstrating that such overregulation was warranted to advance its policy goals.¹⁵ Moreover, the Commission correctly asserts in its Order that there exists considerable ambiguity as to the scope and overall breadth of its rules, which could vary dependent upon what Commission leadership presides over it in succession.¹⁶

¹² See Joint Petition of American Cable Association et al. (Petitioners) for Stay, WC Docket No. 16-106 at 32 (filed Jan. 27, 2017).

¹³ See Order at para. 5.

¹⁴ See *id.*

¹⁵ See *2016 Privacy Order*, 31 FCC Rcd at 14121, 14129.

¹⁶ See Broadband Privacy Order at para. 16 (writing "[t]he weighting of 'data security requirements under HIPA, GLBA, and other relevant statutory frameworks' and other indicia of reasonable data security required by the *Order* would be resource-intensive, and providers could not be sure that they would weigh the factors in the same manner as this or any future Commission.").

IV. Conclusion

In conclusion, the App Association respectfully urges the Commission to reject the Oppositions to Petitions for Reconsideration in this matter, and to vacate its current privacy rules in the Broadband Privacy Order. Finally, if it is to promulgate broadband privacy rules, the Commission should adopt rule mirroring the long-standing approach taken by the FTC.

Respectfully submitted,

/s/ Brian Scarpelli

Brian Scarpelli
Senior Policy Counsel

Joel Thayer
Associate Policy Counsel

ACT | The App Association
1401 K St NW (Ste 501)
Washington, DC 20005
202-331-2130

March 16, 2017